UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

JOSE E. MOJICA-OTERO, appellant, v. DEPARTMENT OF THE TREASURY, agency.	DOCKET NUMBER AT07528510430 DATE February 4, 1986

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

OPINION AND ORDER

The agency petitions for review of an initial decision reversing appellant's removal. The agency's petition is GRANTED. 5 U.S.C. § 7701(e).

Background

On February 21, 1985, the agency removed appellant from his position as a Customs Patrol Officer, GS-9, with the U.S. Customs Service. The agency charged appellant with engaging in conduct prejudicial to the government, taking action adversely affecting the confidence of the public in the government, and using government property for other than official purposes. The charges stemmed from appellant's detention for shoplifting by a security officer in a Sears department store on July 28, 1984. The agency alleged that appellant stole two pairs of shorts and used his badge and credentials to obtain preferential treatment after he was apprehended.

On appeal to the Board's Atlanta Regional Office, the presiding official reversed the agency action. She found that the agency failed to prove appellant had the requisite intent to sustain a charge of theft. Because of this, she also found appellant did not engage in conduct adversely affecting the public confidence in the government. She found that the agency did not prove the third charge because appellant used his credentials only when advised to produce identification or to go to jail. Finally, she rejected appellant's affirmative defenses of national origin and handicap discrimination.

In its petition for review, the agency presents the deposition of Delton Shelton, the security officer who detained appellant, as new and material evidence. It also asserts that the presiding official erred in her factual and legal conclusions.

Analysis

The deposition of Delton Shelton is not new and material evidence.

We find the agency has failed to show that the deposition satisfies the new and material evidence criteria for granting a petition for review because it has not shown that it exercised due diligence to obtain the deposition before the record closed. The agency correctly points out that it requested and obtained a subpoena for Mr. Shelton's appearance at the hearing. See Tabs 6, 8, and 9. It further asserts that it contacted Mr. Shelton and he agreed to appear at the hearing. However, the agency's efforts before the hearing do not absolve it from taking measures during the hearing to ensure that all evidence it wants considered is submitted to the presiding official. Although it informed the presiding official at the hearing that Mr. Shelton was unavailable, it did not ask her to hold the record open for his testimony. See Transcript (Tr.) at 39. The Board has found that such inaction shows a lack of due diligence. See, e.g., Black v.

Department of the Treasury, 26 M.S.P.R. 529, 531 (1985); Hernandez v. United States Postal Service, 10 MSPB 799 (1982). Moreover, the agency indicated by its actions that it intended to present its case without Mr. Shelton's testimony. Because of Mr. Shelton's absence, it asked a witness to identify Mr. Shelton's written statement concerning the shoplifting incident. See Tr. at 39. It also informed the presiding official, at the close of its presentation, that it rested its case. See Tr. at 91.

The agency apparently believed it provided sufficient evidence to convince the presiding official that it correctly removed appellant. When it received the initial decision, it discovered it was mistaken. However, it may not correct this error of judgment after the fact. Black, supra, at 531. Therefore, we will not consider Mr. Shelton's deposition, and the agency's arguments based on the deposition, in reviewing this case. See Avansino v. United States Postal Service, 3 MSPB 308, 310-11 (1980).

The presiding official erred in finding that the agency failed to prove the first two charges against appellant.

The agency contends that the presiding official erred in finding that appellant's written confession to taking the shorts was not voluntary and therefore did not support the agency's case. We agree. The presiding official found appellant's statement involuntary because he was "tremendously concerned over losing his job" and he felt that he had "no choice". See Initial Decision (I.D.) at 3 and 6. We find this insufficient to show that the statement was not a product of appellant's free will. There has been no showing that it was involuntarily extracted or coerced. Indeed, the presiding official herself acknowledged the lack of coercion. See I.D. at 3. Furthermore, the test for duress is an objective one. Appellant's subjective belief that he had no choice does not establish that his statement was involuntary. Cf. Myslik v. Veterans Administration, 2 MSPB 241 (1980) (the appellant's

belief that he must resign or be fired does not show that his resignation was involuntary).

We agree with the agency that appellant's statement plus the other circumstantial evidence establishes the first two charges against appellant. In his statement, appellant admitted that he "took" merchandise "without paying" for it. See Agency File, Tab 6D. Written statements made by an appellant may be used to prove the charges against him. Fields v. Veterans Administration, 20 M.S.P.R. 1, 2-3 (1984). Moreover, circumstantial evidence is generally used to establish intent where, as here, intent is implicit in the charge. Such evidence, if not reasonably and satisfactorily explained, allows a strong inference of culpability with respect to the charges. See Davis v. Department of the Air Force, 27 M.S.P.R. 521, 524 (1985). An inference can be drawn from appellant's unexplained possession of the shorts, especially when they were within his exclusive control. Contrary to the presiding official's conclusion, we do not find appellant's claim that he did not know why the shorts were in his shopping bag or how they got there an "explanation" sufficient to overcome the inference of culpability. See Davis, supra, at 522-23, 525.

Although the presiding official found that appellant was a credible witness and the Board will give deference to a presiding official's credibility determinations, we are free to substitute our own findings on credibility when appropriate. See Jackson v. Veterans Administration, 768 F.2d 1325, 1330-32 (1985); Weaver v. Department of the Navy, 2 MSPB 297, 298 (1980). To support her finding of credibility, the presiding official cited appellant's "consistent" claim that he did not know why he had the shorts in his shopping bag or how they got there. I.D. at 5. As discussed above, this is not a sufficient explanation and similarly not a sufficient indication of credibility. Therefore, we find that the agency has submitted sufficient evidence to prove the first two charges by a preponderance of the evidence.

The agency failed to prove that the presiding official erred in not sustaining the third charge against appellant.

The agency argues that the charge was based not on appellant's use of his badge, as noted by the presiding official, but on his claim to be an undercover officer nearing retirement and his attempt to bribe the police by offering them jobs. However, the charge clearly referred to appellant's use of physical credentials issued for use in establishing identity or authority. See Agency File, Tab 6A. That the agency could have charged appellant with other violations is irrelevant. The Board will not sustain an agency action on the basis of charges that could have been brought, but were not. Johnston v. Government Printing Office, 5 MSPB 376, 377 (1981).

Appellant's removal promotes the efficiency of the service and is a reasonable penalty.

Because of appellant's position as a law enforcement officer, we find that a nexus exists between his off-duty shoplifting and the efficiency of the service. See Austin v. Department of Justice, 10 MSPB 221, 223 (1982).

We also find that removal is an appropriate penalty for the sustained charges. Appellant's offense was serious, especially considering that his job was to enforce the law, not to break it. See Austin, supra, at 224 n.4. Further, the deciding official testified that he considered mitigating factors to a point, but that he decided to remove appellant because of the gravity of the offense; appellant's past disciplinary record; appellant's lack of potential for rehabilitation; and the negative impact of appellant's conduct on law enforcement agencies in general, appellant's ability to perform his job, and his relationship with fellow workers. See Tr. at 84-85. Appellant's disciplinary record shows that he had been suspended three times, reprimanded once, and

downgraded once. See Agency Exhibits G-3 to G-7 (Tab 10). In addition, appellant's removal is consistent with the agency table of penalties. See Agency Exhibit G-2 (Tab 10). We find, therefore, that the agency considered the proper factors in deciding to remove appellant. Douglas v. Veterans Administration, 5 MSPB 313, 332 (1981).

Order

Accordingly, the initial decision is REVERSED and appellant's removal is SUSTAINED.

This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

Notice

The appellant has the statutory right under 5 U.S.C. § 7702(b)(1) to petition the Equal Employment Opportunity Commission (EEOC) for consideration of the Board's final decision, with respect to claims of prohibited discrimination. The statute requires at 5 U.S.C. § 7702(b)(1) that such a petition be filed with the EEOC within thirty (30) days after notice of this decision.

If the appellant elects not to petition the EEOC for further review, the appellant has the statutory right under 5 U.S.C. § 7703(b)(2) to file a civil action in an appropriate United States District Court with respect to such prohibited discrimination claims. The statute requires at 5 U.S.C. § 7703(b)(2) that such a civil action be filed in a United States District Court not later than thirty (30) days after the appellant's receipt of this order. In such an action involving a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, the appellant has the statutory right under 42 U.S.C. §§ 2000e5(f) - (k), and 29 U.S.C. § 794a, to request representation by a court-appointed lawyer, and to request

waiver of any requirement of prepayment of fees, costs, or other security.

If the appellant chooses not to pursue the discrimination issue before the EEOC or a United States District Court, the appellant has the statutory right under 5 U.S.C. § 7703(b)(1) to seek judicial review, if the Court has jurisdiction, of the Board's final decision on issues other than prohibited discrimination before the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The statute requires at 5 U.S.C. § 7703(b)(1) that a petition for such judicial review be received by the Court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.